

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61885; File No. SR-BATS-2010-002)

April 9, 2010

Self-Regulatory Organizations; BATS Exchange, Inc.; Order Approving a Proposed Rule Change, As Amended, to Offer Certain BATS Exchange Data Products

I. Introduction

On February 2, 2010, BATS Exchange, Inc. (“BATS” or the “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹, and Rule 19b-4² thereunder, a proposed rule change to offer certain new Exchange data products to Exchange Members³ and other market data recipients. On February 22, 2010, BATS filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the Federal Register on March 5, 2010.⁴ The Commission received one comment letter in response to the proposed rule change.⁵ On April 8, 2010, BATS filed Amendment No. 2 to the proposed rule change.⁶ This order approves the proposed rule change, as modified by Amendment Nos. 1 and 2.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

⁴ See Securities Exchange Act Release No. 61592 (March 5, 2010), 75 FR 10332 (“Notice”).

⁵ See letter to Elizabeth M. Murphy, Secretary, SEC, from Joan C. Conley, Senior Vice President and Corporate Secretary, The NASDAQ OMX Group, Inc., dated March 26, 2009 (“NASDAQ OMX Letter”).

⁶ See Amendment No. 2 dated April 8, 2010 (“Amendment No. 2”). The text of Amendment No. 2 is available on the Exchange’s Web site at <http://www.batstrading.com>, at the principal office of BATS, and on the Commission’s

II. Description of the Proposal

The Exchange proposes to offer several new market data products: BATS Last Sale Feed; BATS Historical Data Products; and BATS Market Insight (“New Market Data Products”). In connection with making available the New Market Data Products, the Exchange proposes to amend its fee schedule applicable to Members and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c).⁷

BATS Last Sale Feed. The BATS Last Sale Feed will be a direct data feed product that provides real-time, intraday trade information, including price, volume, and time of executions.⁸ The BATS Last Sale Feed will include last sale information regarding all NYSE-listed securities (“Tape A Securities”), NASDAQ-listed securities (“Tape C Securities”), and securities listed on exchanges other than NYSE or NASDAQ (“Tape B Securities”) with respect to activity occurring solely on the Exchange.⁹

Web site (<http://www.sec.gov/rules/sro.shtml>). Amendment No. 2 is a non-substantive, clarifying amendment.

⁷ The Exchange currently offers other data products to Members and other data recipients free of charge. The Exchange states that such data products include, but are not limited to, TCP PITCH, Multicast PITCH, and TCP FAST PITCH, which are depth of book data feeds containing real-time quotation and transaction data from the Exchange; TCP DROP, which contains order execution and other information (e.g., modifications and cancellations) specific to the Exchange activity of one or more Users; and TCP TOP, which contains real-time top of book quotation and transaction information from the Exchange. The Exchange represents that BATS will file a proposed rule change pursuant to Section 19(b)(1) of the Act and Rule 19b-4 thereunder to describe its existing free data feeds. See Amendment No. 2, *supra* note 6.

⁸ The BATS Last Sale feed will not include quotation information.

⁹ Currently, under the joint-industry plans that provide for the dissemination of last sale information for equity securities, the Exchange and other self-regulatory organizations (“SROs”) provide real-time last sale information to a Security Information Processor (“SIP”), which then consolidates the information into a single stream for dissemination to the public, including market data vendors.

No market participant will be required to subscribe to the BATS Last Sale Feed and the same last sale prices will continue to be available in the Exchange's other data feeds.¹⁰ The Exchange represents that it will not distribute the BATS Last Sale Feed sooner than it makes available the data that is provided to the SIPs for consolidation and dissemination.¹¹ BATS proposes to charge \$5,000 per month for the BATS Last Sale Feed for any data recipient that chooses to receive the data feed for internal use only ("Internal Distributor"). The Exchange will not require data recipients that wish to redistribute the BATS Last Sale Feed to count, classify (e.g., professional or non-professional), or report to the Exchange information regarding the customers to which they provide the data. Instead, the Exchange proposes a flat fee of \$25,000 per month for any data recipient that wishes to redistribute the BATS Last Sale Feed externally ("External Distributor"). End users will not have to pay the Exchange for the BATS Last Sale Feed or enter into contracts with the Exchange.

BATS Historical Data Products. The Exchange proposes to offer data recipients upon request the following three products: (1) historical top of book data from the Exchange's TOP data feed ("Historical TOP Data"); (2) historical quotation and transaction data from the Exchange's PITCH data feed ("Historical PITCH Data"); and (3) historical transaction data from the Exchange's Last Sale Feed ("Historical Last Sale Data").¹² BATS Historical TOP Data,

¹⁰ See supra note 7.

¹¹ See Notice, supra note 4, at 10333.

¹² The Exchange proposes to provide data recipients with the requested historical data on an external hard drive provided by the Exchange. As an alternative means to obtain historical data, the Exchange proposes to provide market participants with access to a database from which they can download data that is up to three months old.

BATS Historical PITCH Data and BATS Historical Last Sale Data will be provided to data recipients for internal use only, and thus, no redistribution will be permitted.¹³

The proposed cost of user-accessible BATS Historical TOP Data, BATS Historical PITCH Data or BATS Historical Last Sale Data is \$500 per month of data accessed by any individual user. For data that the Exchange provides on an external hard drive to a market participant the proposed cost is \$2,500 per 1 terabyte (TB) drive generated by the Exchange.¹⁴

BATS Market Insight. The Exchange proposes to begin offering BATS Market Insight that can be used to analyze the depth of liquidity of the Exchange's book, including reserve and hidden interest, on a historical basis. BATS Market Insight will provide a market participant with information regarding the depth of the market at the Exchange in minute increments. Data will become available for access by market participants 10 days following each trade date (T + 10) and will be available for 30 days.¹⁵ BATS Market Insight will be provided to data recipients for internal use only, and thus, no redistribution will be permitted. The proposed cost for access to BATS Market Insight is \$1,000 per user per month.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities

¹³ The Exchange currently provides historical data upon request on an ad hoc basis, but proposes to begin charging a fee due to the infrastructure costs of storing and providing such data.

¹⁴ For a more detailed description of how the proposed fees operate, see Notice, supra note 4, at 10334.

¹⁵ Specifically, a participant using BATS Market Insight will be able to obtain data regarding total order interest, displayed order interest and hidden order interest at each price point in specific Tape A, B, and C securities traded on the Exchange.

exchange.¹⁶ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,¹⁷ which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities, and Section 6(b)(5) of the Act,¹⁸ which requires, among other things, that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Commission also finds that the proposed rule change is consistent with Section 6(b)(8) of the Act¹⁹ in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Commission has reviewed the proposal using the approach set forth by the Commission for non-core market data fees.²⁰ In the NYSE Arca Order, the Commission stated that “when possible, reliance on competitive forces is the most appropriate and effective means to assess whether the terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory.”²¹ It noted that the “existence of significant competition provides a substantial basis for finding that the terms of an exchange’s fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.”²² If an exchange “was subject to significant competitive forces in setting the terms of a proposal,” the Commission will approve a proposal unless it determines that “there is a substantial

¹⁶ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁷ 15 U.S.C. 78f(b)(4).

¹⁸ 15 U.S.C. 78f(b)(5).

¹⁹ 15 U.S.C. 78f(b)(8).

²⁰ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21) (“NYSE Arca Order”).

²¹ Id. at 74771.

²² Id. at 74782.

countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder.”²³

As noted in the NYSE Arca Order, the standards in Section 6 of the Act do not differentiate between types of data and therefore apply to exchange proposals to distribute both core data and non-core data.²⁴ All U.S. exchanges trading NMS stocks are required pursuant to Rule 603(b)²⁵ of the Act to provide "core data" -- the best-priced quotations and comprehensive last sale reports -- to a SIP to consolidate and disseminate to the public pursuant to joint-SRO plans.²⁶ In contrast, individual exchanges and other market participants distribute non-core data voluntarily.²⁷ The mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees.²⁸ Non-core data products and their fees are, by contrast, much more sensitive to competitive forces. The Commission therefore is able to rely on competitive forces in its determination of whether an exchange’s proposal to distribute non-core data meets the standards of Section 6.²⁹

Because the instant proposal to offer New Market Data Products relates to the distribution of non-core data, the Commission will apply the market-based approach set forth in

²³ Id. at 74781.

²⁴ Id. at 74779.

²⁵ 17 CFR 242.603(b).

²⁶ See Consolidated Tape Association Plan (“CTA Plan”) and Consolidated Quotation Plan (“CQ Plan”). The two plans, which have been approved by the Commission, are available at <http://www.nysedata.com>. See also the Joint-Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis (“Nasdaq UTP Plan”). The Nasdaq UTP Plan, which has been approved by the Commission, is available at <http://www.utpdata.com>.

²⁷ See NYSE Arca Order, supra note 20, at 74779.

²⁸ Id.

²⁹ Id.

the NYSE Arca Order. Pursuant to this approach, the first step is to determine whether BATS was subject to significant competitive forces in setting the terms of its non-core market data proposal, including the level of any fees. As in the NYSE Arca Order, in determining whether BATS was subject to significant competitive forces in setting the terms of New Market Data Products, the Commission has analyzed BATS' compelling need to attract order flow from market participants, and the availability to market participants of alternatives to purchasing BATS' non-core market data.

Attracting order flow is the core competitive concern of any equity exchange. Given the competitive pressures that currently characterize the U.S. equity markets, no exchange can afford to take its market share percentages for granted – they can change significantly over time, either up or down.³⁰ BATS competes with the other national securities exchanges that currently trade equities, with electronic communication networks, with quotes posted in FINRA's Alternative Display Facility, with alternative trading systems, and with securities firms that primarily trade as principal with their customer order flow.³¹

In addition to the need to attract order flow, the availability of alternatives to New Market Data Products significantly affect the terms on which BATS can distribute this market data.³² In setting the fees for New Market Data Products, BATS must consider the extent to which market participants would choose one or more alternatives instead of purchasing its data.³³ With respect to BATS Last Sale Feed, market participants can also gain access to BATS last sale prices through free data feeds provided by the Exchange or those integrated with the prices that other

³⁰ Id. at 74782.

³¹ See Notice, supra note 4, at 10334.

³² See NYSE Arca Order supra, note 20, at 74784.

³³ Id. at 74783.

markets make available through the SIPs.³⁴ Further, other national securities exchanges, the several Trade Reporting Facilities of FINRA, and ECNs can produce last sale information products, and thus are sources of potential competition for BATS.³⁵ With respect to BATS Market Insight, BATS states that a market participant could gain access to the same information through a combination of: (1) existing, free data feeds from the Exchange (for displayed trading interest); and (2) information gathered by the market participant through its trading activities on the Exchange and/or through the consolidated data published by the SIPs reporting executions that occurred on the Exchange (for non-displayed trading interest).³⁶ With respect to BATS Historical Data Products, the Exchange notes that market participants can gain access to the same information that BATS proposes to make available through BATS Historical Data Products feed through existing, free data feeds from the Exchange. Further, the Commission notes that BATS last sale and quotation information also is available through the consolidated data feed disseminated by the SIPs. The Exchange also notes that a similar product is offered by Nasdaq.³⁷

The Commission believes that there are a number of alternative sources of information that impose significant competitive pressures on BATS in setting the terms for distributing the New Market Data Products. The Commission believes that the availability of those alternatives, as well as BATS' compelling need to attract order flow, imposed significant competitive pressure on BATS to act equitably, fairly, and reasonably in setting the terms of its proposal.

Because BATS was subject to significant competitive forces in setting the terms of the proposal, the Commission will approve the proposal in the absence of a substantial

³⁴ See Notice, supra note 4, at 10334.

³⁵ BATS represented that many other market centers, including Nasdaq and the New York Stock Exchange LLC, do in fact currently produce last sale information products. Id.

³⁶ See Notice, supra note 4, at 10334.

³⁷ See Nasdaq Rule 7022.

countervailing basis to find that the terms of the proposal fail to meet the applicable requirements of the Act or the rules thereunder. An analysis of the proposal does not provide such a basis. The Commission notes that the proposed fees for BATS Last Sale Feed are lower for Internal Distributors than for External Distributors. Because Internal Distributors are by definition more limited in the scope of their distribution of BATS Last Sale Feed than External Distributors, it is reasonable to expect that Internal Distributors will provide BATS Last Sale Feed to a smaller number of internal recipients.³⁸ The Commission notes that the fees for BATS Historical Data Products and BATS Market Insight are the same for all persons. The fees therefore do not unreasonably discriminate among types of recipients.

As noted above, the Commission received one comment letter on the proposed rule change.³⁹ The commenter questions whether the Act and the rules thereunder require SROs to file a proposed rule change to offer at no charge electronic data feeds of transaction information generated by an SRO. In response to this comment, BATS filed Amendment No. 2, in which it represents that BATS will file a proposed rule change pursuant to Section 19(b)(1) of the Act and Rule 19b-4⁴⁰ thereunder describing its current free data feeds.⁴¹

³⁸ Conversely, External Distributors can reasonably be expected to distribute BATS Last Sale Feed to a higher number of recipients because they do not have the same limitation. Accordingly, the Exchange will charge a higher fee to External Distributors than to Internal Distributors. The Exchange noted in its filing that “[r]egardless of a data recipient’s reasons for subscribing to the BATS Last Sale Feed, the fee for such feed applies equally to all data recipients that wish to use the feed for internal use only and equally to all data recipients that wish to redistribute the feed.” See Notice, supra note 4, at 10333. For a similar distinction, see, e.g., Securities Exchange Act Release No. 60459 (August 7, 2009), 74 FR 41466 (August 17, 2009) (SR-Phlx-2009-54) (order approving a proposed rule change to establish fees for the Top of Phlx Options direct data feed product).

³⁹ See supra note 5.

⁴⁰ 17 CFR 240.19b-4.

⁴¹ See supra note 6.

Further, NASDAQ OMX asserts that the proposal raises the question of whether the Act permits an exchange to offer the same transaction information via two different delivery mechanisms for two different prices.⁴² NASDAQ OMX then cites two of its own proposed rule changes and attempts to analogize them with the instant proposal, stating that the instant proposal implicates issues of what constitutes fair versus unfair discrimination with respect to the fees charged for market data. The Commission believes that the two proposed rule changes cited by NASDAQ OMX are factually different than the BATS' proposed rule change. As discussed above, the Commission believes that BATS offering of New Market Data Products is not unfairly discriminatory.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-BATS-2010-002), as modified by Amendments No. 1 and 2, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴³

Florence E. Harmon
Deputy Secretary

⁴² NASDAQ OMX was referring to the BATS Last Sale Feed that contains last sale information that is also offered via PITCH free of charge.

⁴³ 17 CFR 200.30-3(a)(12).